

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

CITY OF AVALON
P.O. Box 707
Avalon, CA 90704

Attn: Planning Director

SPACE ABOVE THIS LINE FOR RECORDER'S USE

This Development Agreement is recorded at the request and for the benefit of the City of Avalon and is exempt from the payment of a recording fee pursuant to Government Code § 27383.

THIRD AMENDED DEVELOPMENT AGREEMENT
BETWEEN
CITY OF AVALON, CALIFORNIA
AND
HAMILTON PACIFIC, LLC

APRIL 14, 2008

DEVELOPMENT AGREEMENT

DEVELOPMENT AGREEMENT made and entered into as of this 14th day of April, 2008, by and between the City of Avalon, a municipal corporation of the State of California ("City"), and Hamilton Pacific, LLC, a California limited liability company ("Hamilton Pacific" or "Developer") (collectively "the Parties"). The Parties desire to amend the Agreement to incorporate previously agreed changes pertaining to the

project description, specifically the housing mix and the height envelope thereto. (The Third Amended Agreement is referred to herein as "Agreement.")

Recitals

A. To strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic risk of development, the Legislature of the State of California adopted the "Development Agreement Statute," Sections 65864, *et seq.*, of the Government Code. The Development Agreement Statute authorizes City to enter into an agreement with any person having a legal or equitable interest in real property and to provide for the development of such property and to establish certain development rights therein. Pursuant to the authorization set forth in the Development Agreement Statute, City adopted its Ordinance No.881-92 on September 1, 1992, establishing procedures for the consideration and approval of development agreements.

B. Hamilton Land Holdings, Inc. ("HLH"), a wholly-owned subsidiary of the Santa Catalina Island Company, a Delaware corporation ("SCICo"), is the owner of approximately 16 undeveloped acres in the City (the "Property") in the area known as Hamilton Cove, generally depicted on the map attached hereto as Exhibit A. HLH has executed a Development and Purchase and Sale Agreement in favor of Hamilton Pacific which permits Hamilton Pacific to develop congregate units and single family lots and associated recreational facilities and infrastructure improvements thereon, referred to herein as Hamilton Cove Phase II (the "Project").

C. This Agreement is intended to be, and shall be construed as, a development agreement within the meaning of the Development Agreement Statute. This Agreement will eliminate uncertainty in planning for and secure the orderly development of the Project, ensure a desirable and functional community environment, provide effective and efficient development of public facilities, infrastructure, and services appropriate for the development of the Project, assure attainment of the maximum effective utilization of resources within the City, and provide other significant public benefits to City and its residents by otherwise achieving the goals and purposes of the Development Agreement Statute. In exchange for these benefits to City, Hamilton Pacific desires assurance that it may proceed with development of the Project in accordance with the terms and conditions of this Agreement, the "Existing Land Use Regulations" and the "Approvals," all as more particularly set forth herein.

D. The City has determined that the Project is consistent with the goals and policies of the City's General Plan and imposes appropriate standards and requirements with respect to the development of the Property in order to maintain the overall quality of life and of the environment within the City. Prior to its approval of this Agreement, City considered the environmental impacts of the Project and completed its environmental review of the Project

E. Hamilton Pacific plans to build the Project in eight to ten phases, spaced approximately one year apart, in order to maximize marketing opportunities and to enable it to adjust its housing product as appears necessary and appropriate over time.

F. Concurrently with or prior to approval of the Agreement, the Avalon City Council adopted Zoning Ordinance Amendment, Ord. No. 1060-07. The Avalon Planning Commission has approved a site plan, conditional use permit, height, setback, lot coverage and parking variances, tentative tract map(s) and a coastal development permit, which actions collectively authorize development of the Project at Hamilton Cove in accordance with this Agreement (collectively, the "Approvals.")

G. Hamilton Pacific wishes to enter into a development agreement with City to memorialize the terms and conditions upon which development standards and the conditions of the Approvals will be addressed and permits will be issued and implemented over the phased development, recognizing that doing so will decrease the uncertainties associated with the project. The mitigations and/or requirements of this agreement are based on the findings in the Focused EIR, the addendum to the Focused EIR, the Mitigation Monitoring Plan and the City's Affordable Housing Ordinance.

In the consideration of the recitals and the covenants and promises of the Parties herein contained, the Parties agree as follows:

1. Definitions

1.1 Defined Terms. Each reference in this Agreement to any of the following terms shall have the meaning set forth below for each such term.

1.2 Approvals. Any and all permits, approvals, or governmental consents or permissions of any kind required under the Ordinances to develop the Project, including without limitation, any amendments to any such Ordinances

heretofore or hereafter enacted, necessary or appropriate to the legal right to develop the Project.

1.3 Housing Land Agreement. That certain agreement or agreements, in the form of a ground lease, joint venture agreement or similar document between HLH or SCICo and Developer, providing for construction and operation of the Housing Project(s) consistent with the terms of this Agreement and the Existing Approvals.

1.4 Housing Project(s) . Developer is required to construct a total of 18 new housing units, either inclusionary housing units imposed as a condition of approval, or as environmental mitigation. One unit is required to be constructed at Hamilton Cove to serve as a manager's unit. Developer is required to build seventeen (17) additional units, eight (8) of which are to be developed to comply with an environmental mitigation imposed upon and required as a condition of the Approvals for the Project, together with nine (9) housing units required to be developed as a condition of the Approvals for the Project in accordance with the Inclusionary Housing Ordinance.

1.5 City . The City of Avalon, California, its elective and appointive boards, commissions, officers, agents, and employees, including, without limitation, any community facilities district, assessment district, reimbursement district or other financing authority or district formed by the City of Avalon individually or in conjunction with any other local agency.

1.6 City Council . The City Council of the City.

1.7 City Manager . The City Manager of the City.

1.8 Coastal Commission . The California Coastal Commission.

1.9 County . The County of Los Angeles, California.

1.10 Development Agreement. The agreement entered into by the City and Hamilton Pacific pursuant to California Government Code §§65864 -65859.5 concerning the Project.

1.11 Developer. Hamilton Pacific, or such other entity selected by SCICo to which it assigns non-expired approvals to develop the Hamilton Cove Phase II project as provided herein.

1.12 Existing Land Use Regulations. The term "Existing Land Use Regulations" shall mean City's General Plan, Zoning Code, and all other ordinances, resolutions, rules, and regulations of City governing development and use of the Property in effect as of the Effective Date, including without limitation the permitted uses of the Property, the density and intensity of use, maximum height and size of proposed buildings, provisions for the reservation and dedication of land for public purposes, and, subject to the following sentence, construction standards and specifications. The term "Existing Land Use Regulations" does not include the Uniform Codes pertaining to construction adopted for general application in City.

1.13 Housing Developer. Hamilton Pacific, or such other entity affiliated with Hamilton Pacific selected by SCICo to develop and/or operate the Housing Project(s).

1.14 Inclusionary Housing Ordinance. Title 9, Chapter 11 of the Avalon Municipal Code as adopted and in effect as of the Effective Date of this Agreement, and such revisions or implementing regulations not inconsistent with this Agreement and the Existing Approvals, as may be adopted by City from time to time.

1.15 Laws. The Constitution and laws of the State of California and of the United States, and any codes, statutes or executive mandates in any court decision, State or federal, thereunder.

1.16 Local Coastal Plan . The Local Coastal Plan adopted by City by Ordinance No. 672 and amendments approved as of the Effective Date.

1.17 Mitigation Monitoring Plan . That certain Mitigation Monitoring Plan, a copy of which is attached hereto as to the Development Agreement as Exhibit B , and the Mitigation Monitoring Plan to be adopted by City for the Bird Park Housing Project(s).

1.18 Mortgage . A mortgage, deed of trust, sale and leaseback arrangement in which the Property or a portion thereof or an interest therein (including, without limitation, the interest to be held by Developer in the Property) is sold and leased back concurrently therewith (which arrangement is subject to prior contractual encumbrances securing payment of money), or other transaction in which the Property, or a portion thereof or an interest therein, is pledged as security, contracted in good faith and for fair value.

1.19 Mortgagee . The holder of the beneficial interest under a Mortgage,

or the owner of a leasehold interest in the Property under a Mortgage.

1.20 Ordinances . The ordinances, resolutions, codes, rules, regulations and official policies of City, governing the development and use of real property, including, without limitation, such matters as land use, density, design, height and setback requirements, and any other matters affecting the development of the Property. Specifically, but without limiting the generality of the foregoing, Ordinances shall include City's General Plan, Local Coastal Plan, Zoning Ordinance, and Subdivision Ordinance.

1.21 Parties . City and Hamilton Pacific, and their respective successors and assigns permitted by this Agreement.

1.22 Person . Any individual, corporation, partnership, joint venture, or other legal entity.

1.23 Processing Fee . Fees for processing applications for governmental approvals, including, without limitation, plan check fees, building permit fees, mitigation monitoring costs, inspection fees, legal review costs and similar fees, whether based on the value of the construction that is the subject of the application or designed generally to reimburse City's administrative costs of processing, reviewing and inspecting such applications and the construction being or to be performed pursuant thereto as adopted by resolution of the City Council from time to time.

1.24 Project . The congregate units, single family lots and recreational and other amenities, and associated on-site and off-site improvements to be developed

and known as Hamilton Cove Phase II, as approved by the Planning Commission or as they may be further refined, enhanced or modified pursuant to this Agreement and all mitigations imposed as a condition of such approvals.

1.25 Project Phases. The Project shall be constructed in 9 phases with a maximum of 10 units per phase. Each phase may be comprised of either one or more multi unit congregate structures, single family units or a combination of both to be developed and known as Hamilton Cove Phase II. Each phase shall not to exceed 10 units for purposes of other requirements associated with particular phases. Phases are not intended to be based on a timeline but are intended to be based on a defined number of units and once 10 units are constructed, a new phase shall begin..

1.26 Property . The approximate 16.5 acres of real property on which the Parties contemplate development of the Hamilton Cove Phase II Project.

1.27 Required Improvements. The Housing Project(s), the Casino Way and Metropole Avenue parking spaces, the purchase of the Fire Truck, and the Bioxide Injector on Casino Way. ~~1.27~~

1.28 Term . The Term of this Agreement as determined under Section 3. below.

1.29 Terms Otherwise Defined . Any terms defined in the Development Agreement Ordinance, when capitalized in this Agreement, shall have the meaning set forth therein. Any terms defined elsewhere in this Agreement shall have the meanings set forth in such definitions.

2. Limitation on Obligations of Parties. No Party shall be bound to perform the obligations imposed on any other Party hereto, except as expressly set forth herein. Unless otherwise stated to the contrary herein or otherwise required by law, the obligations of Developer as provided for in this Agreement shall not be construed as obligations of SCICo.

3. Term.

3.1 Effective Date. This Agreement shall be effective as of the date it is executed by the Parties (hereafter "the Effective Date.").

3.2 Term. Except as set forth in Subsection 3.3 and Sections 4 and 5, the Term of this Agreement shall commence on the Effective Date and shall terminate twenty (20) years thereafter. Notwithstanding the foregoing, this Agreement will terminate if Hamilton Pacific or a subsequent Developer has not commenced construction (of the first phase of the Project (commencement of construction shall be defined as foundations and framing in progress) or has not commenced construction of the 18 new affordable housing units on or before April 30, 2011 (the "Construction Commencement Date.") The parties agree that such construction has commenced. The provisions of Section 4.13 (Indemnity) will remain in effect and be binding notwithstanding such termination.

3.3 Termination Upon Sale of Individual Units or Single Family Lots to Public and Completion of Construction. Notwithstanding Section 3.2, and except as set forth in Section 3.4, the provisions of this Agreement shall terminate with respect to any

individual congregate housing unit or single family lot and such unit or lot shall be released from and shall no longer be subject to this Agreement (without the execution or recordation of any further document or the taking of any further action) upon the satisfaction of both of the following conditions: (a) the unit or lot has been finally subdivided and sold or leased (for a period longer than one (1) year) to a member of the public or any other ultimate user; and (b) a certificate of occupancy has been issued for the unit or for the building containing the unit or buildings on the lot or a final inspection of the building(s) or lot has been approved by City. City shall cooperate with Developer, at no cost to City, in executing in recordable form any document that Hamilton Pacific or its successor or assignee may submit to confirm the termination of this Agreement as to any such unit or lot.

3.4 Term of Housing Covenants . Notwithstanding Sections 3.2 and 3.3, the rights and obligations of Developer set forth in Section 4.10(b) of this Agreement with regard to the construction and operation of employee housing in accordance with the City's rules and regulations relating thereto, including but not limited to the Inclusionary Housing Ordinance, shall survive the termination of this Agreement and remain in effect for the longer of any period of time required because of a funding source, such as redevelopment set-aside funds, or fifty-five (55) years in the case of rental housing, and forty-five (45) years in the case of for-purchase/owner-occupied housing.

4. Development of the Property.

4.1 Applicable Regulations; Vested Right to Develop. Except as expressly set forth herein, during the Term of this Agreement, the terms and conditions of development applicable to the Property, including but not limited to the permitted uses of the Property, the density and intensity of use, maximum height and size of proposed buildings, and provisions for the reservation and dedication of land for public purposes, shall be those set forth in the Existing Land Use Regulations and the approvals issued by City, including but not limited to variances and conditional use permits. In connection therewith, subject to the terms and conditions of this Agreement, Developer shall have the vested right to carry out and develop the Project on the Property in accordance with the Existing Land Use Regulations and the approvals issued by City, including variances and conditional use permits.

4.2 Administrative Approval of Minor Modifications: The Planning Director shall have the authority to administratively (a) if requested by Developer and supported by an engineering feasibility study, to adjust the allocation of the number of parking spaces to be created by Developer on Metropole Avenue and Casino Way between those two locations, provided the total number is consistent with the requirements of the Mitigation Monitoring Plan and the Existing Approvals, unless amendments to the Mitigation Monitoring Plan are adopted and agreed to by the Parties to address the traffic mitigations identified in the certified EIR and (b) adopt such environmentally based traffic mitigations as may be determined and approved by the Planning Commission and City Council as alternatives to the traffic mitigations proposed

in the certified EIR, provided such alternative mitigation measures do not result in increased cost or delay to Developer above that which would be incurred under the certified EIR; and (c) at Developer's request approve modifications to the approvals issued by City for the Project which (i) do not increase the total number of congregate units or single family lots, or increase the square footage of any congregate unit building in excess of the development standards in effect as of the Effective Date or as permitted under variance(s) granted by the Planning Commission (noted below in *italics*), or (ii) consist solely of changing the siting of buildings within the boundaries of the Project, provided such siting complies with the development standards in effect as of the Effective Date or as modified by variance(s) granted by the Planning Commission (all as noted below in *italics*), as follows:

Avalon Municipal Code Sec. 9-5.205 Standards of Development.

Premises in the LD zone shall be subject to the development standards prescribed in this section and those standards contained in Chapter 7 (General Standards of Development).

(a) Maximum Permitted Density.

(1) Ten (10) dwelling units per acre for slopes under thirty (30°) degrees.

(2) Five (5) dwelling units per acre for slopes from thirty (30°) degrees to fifty (50°) degrees.

(3) One dwelling unit per acre for slopes fifty (50°) degrees or more.

(4) Clustered developments up to ten (10) dwelling units per acre for slopes under thirty (30°) degrees.

(5) Density transfer can be permitted to a maximum density of twenty (20) units per acre under a conditional use permit provided it does not exceed overall density of ten (10) units per acre.

(b) Minimum Permitted Lot Area. Single family detached dwelling units - each lot or parcel of land created after the adoption of this title shall have a minimum lot size of four thousand four hundred (4,400) square feet. These minimum lots shall be multiplied

by two (2) for lots with slopes of thirty (30%) degrees to fifty (50%) degrees, and by ten (10) for lots with slopes of more than fifty (50%) degrees.

Single family attached - no minimum, however, no more than thirty (30) residential building lots per acre will be allowed, provided that overall project density does not exceed ten (10) dwelling units per acre for slopes under thirty (30%) degrees.

(c) Minimum Permitted Lot Width. Single family detached dwelling units - each lot or parcel created after adoption of this title shall have a minimum width of fifty (50') feet.

(1) Single family attached dwelling units - no minimum.

(2) Other uses - to be determined by the Commission.

(d) Minimum Required Setbacks.

(1) A seventy-five (75') foot setback from the center line of major Zoning Districts Map. The distance shall follow the natural grade. This is not to exclude the locating, where necessary, of roads for public safety, utility, or service uses provided such are sited, landscaped, and maintained in a manner consistent with preserving the scenic value of these ridge lines.

(2) Front, Side and Rear Setbacks - Ten (10') feet. Where the lower property line of a hillside or a steep hillside lot is adjacent to a public street, there shall be a maximum height of fourteen (14') feet from the lot's surface (as measured from the center line of the nearest adjacent street and extending as a vertical plane to the lot's existing surface as of January 1, 1990), along a distance equal to one-eighth (1/8) the length of the lot plus the setback required for the zone (as measured through the center line of the lot back from the street side setback). Notwithstanding the foregoing, set backs for buildings constructed on the foundation pads existing as of the Effective Date shall be in accordance with variances as granted by the Planning Commission as part of the Existing Approvals.

(e) Building Bulk.

(1) Maximum Permitted Height – In accordance with the height variance granted as part of the approvals dated 9/26/2007 for Tentative Tract Map No. 69836 which included a height envelope of 22'/50' for 21 parcels for condominiums and 18'/40' for 24 parcels for single family dwellings and the height variance granted 3/16/2014 for 22'/50' for the twelve parcels of TM 72448 for single family dwellings. Excluding chimneys, eaves and minor decorative architectural elements such as elevator tower caps, pergolas and similar structures

(2) Maximum permitted lot coverage.

- (i) Single family detached and other uses: forty (40%) percent of gross lot area.
- (ii) Single family attached: forty (40%) percent of gross lot area.

Notwithstanding the foregoing, maximum lot coverage for the buildings constructed on the foundation pads existing as of the Effective Date shall be in accordance with variances as granted by the Planning Commission as part of the Existing Approvals.

(3) Maximum permitted floor area.

(i) Single family detached and other uses: eighty (80%) percent of gross lot area - two (2) level; 120 percent of gross lot area - three (3) level.

(ii) Single family attached: eighty (80%) percent of gross tract area - two (2) level; 120 percent of gross area - three (3) level.

(f) Off-Street Parking. *In accordance with the parking variance granted as part of the Existing Approvals for the Hamilton Cove Project, one (1) on-site autoette space shall be provided for each unit.*

(g) Trash Storage.

(1) Single family detached - one (1) enclosed, off-street trash storage area shall be required for each dwelling unit.

(2) Single family attached and other uses - sufficient enclosed, off-street trash storage areas shall be required to serve the project.

4.3 Tentative Subdivision Maps. With respect to applications by Developer for tentative subdivision maps for portions of the Parcel, City agrees that Developer may file and process vesting tentative maps in accordance with Chapter 4.5 (commencing with Section 66498.1) of Division 2 of Title 7 of the California Government Code and the applicable provisions of City's subdivision ordinance, as the same may be amended from time to time. If final maps are not recorded for the entire Parcel before such tentative map(s) would otherwise expire, the term of such tentative map(s)

automatically shall be extended for the Term of this Agreement.

4.4 Processing of Applications and Permits. Upon satisfactory completion by Developer of all required preliminary actions and payment of appropriate processing fees, if any, City shall proceed to process and check all applications for Project development and building approvals within the times set forth in the Permit Streamlining Act (Chapter 4.5 (commencing with Section 65920) of Division 1 of Title 7 of the California Government Code), the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the California Government Code), and other applicable provisions of law, as the same may be amended from time to time.

4.5 Other Governmental Permits. Provided that Developer pays the reasonable cost of such cooperation, after City has approved the development of any portion of the Property, City shall cooperate with efforts to obtain such additional permits and approvals as may be required by any other governmental or quasi-governmental agencies having jurisdiction over such portion of the Property, which permits and approvals are consistent with City's approval and which are consistent with applicable regulatory requirements. City does not warrant or represent that any other governmental or quasi-governmental permits or approvals will be granted.

4.6 Assurances to Developer. The Parties acknowledge that the public benefits to be provided by Developer to City pursuant to this Agreement are in consideration for and reliance upon assurances that City will permit development of the Property in accordance with the terms of this Agreement. Accordingly, City agrees that it will not attempt to restrict or limit the development of the Property in a manner that conflicts with the provisions of this Agreement. City acknowledges that Developer cannot at this time predict the timing or rate at which the Property will be developed. The timing and rate of development depend on numerous factors such as market demand, interest rates, absorption, completion schedules, and other factors which are not within the control of Developer or City. In *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465, the California Supreme Court held that a construction company was not exempt from a city's growth control ordinance notwithstanding that the construction company and the city had entered into a consent judgment (tantamount to a contract under California law) establishing the company's vested rights to develop its property in accordance with the zoning. The California Supreme Court reached this result on the basis that the consent judgment failed to address the timing of development. It is the intent of the Parties to avoid the result of the *Pardee* case by acknowledging and providing in this Agreement that Developer shall have the vested right to develop the Property in such order and at such rate and at such time as Developer deems appropriate within the exercise of Developer's sole subjective business judgment, notwithstanding the adoption of an initiative after the Effective Date

by City's electorate to the contrary. In addition to and not in limitation of the foregoing, but except as set forth in the following sentence, it is the intent of the Parties that no City moratorium or other similar limitation relating to the rate or timing of the development of the Project or any portion thereof, whether adopted by initiative or otherwise, shall apply to the Property to the extent such moratorium or other similar limitation is in conflict with the express provisions of this Agreement. Notwithstanding the foregoing, but subject to the provisions of Section 3.2 regarding the Commencement of Construction Date and Section 5 regarding Permitted Delays and *force majeure*, Developer acknowledges and agrees that nothing herein is intended or shall be construed as (a) overriding any provision set forth in this Agreement relating to the rate or timing of development of the Project, including without limitation the obligation of Developer to construct the Housing Project(s) within the time set forth herein, (b) overriding any provision of the Existing Land Use Regulations or the approvals granted by City relating to the rate or timing of development of the Project, or, (c) restricting City from exercising the powers described in Section 4.7 of this Agreement to regulate development of the Property. Nothing in this Section 4.6 is intended to excuse or release Developer from any obligation set forth in this Agreement which is required to be performed on or before a specified calendar date or event without regard to whether or not Developer proceeds with the Project.

4.7 Reservations of Authority. Notwithstanding any provision set forth in this Agreement to the contrary, the laws, rules, regulations, and official policies

set forth in this Section 4.7 shall apply to and govern development of the Property:

(a) Consistent Future City Regulations. City ordinances, resolutions, regulations, and official policies adopted or approved after the Effective Date pursuant to procedures provided by law which do not conflict with the Existing Land Use Regulations shall apply to and govern development of the Property.

(b) Overriding State and Federal Laws and Regulations. State and federal laws and regulations which override Developer's vested rights set forth in this Agreement shall apply to the Property, together with any City ordinances, resolutions, regulations, and official policies which are necessary to enable City to comply with such overriding State and federal laws and regulations; provided, however, that (i) Developer does not waive its right to challenge or contest the validity of any such State, federal, or local laws, regulations or official policies; and (ii) in the event that any such State or federal law or regulation (or City ordinance, resolution, regulation, or official policy undertaken pursuant thereto) prevents or precludes compliance with one or more provisions of this Agreement, the Parties agree to consider in good faith amending or suspending such provisions of this Agreement as may be necessary to comply with such State or federal laws, provided that no Party shall be bound to approve any amendment to this Agreement unless this Agreement is amended in accordance with the procedures applicable to the adoption of development agreements as set forth in the Development Agreement Statute and each Party retains full discretion with respect thereto.

(c) Public Health and Safety. Any City ordinance, resolution,

regulation, or official policy, which is necessary to protect persons on the Property or in the immediate community, or both, from conditions dangerous to their health or safety, or both, notwithstanding that the application of such ordinance, resolution, regulation, or official policy or other similar limitation would result in the impairment of Developer's vested rights under this Agreement.

(d) Uniform Construction Codes. Provisions of the building standards set forth in the Uniform Construction Codes shall apply to the Property. As used herein, the term "Uniform Construction Codes" collectively refers to the California Building Codes, the California Electric Code, the California Plumbing Code, the California Mechanical Code, the Uniform Solar Energy Code, the Uniform Swimming Pool, Spa and Hot Tub Code, the Uniform Housing Code, the Uniform Administrative Code, and the California Fire Code (including amendments thereto by the Los Angeles County), as modified and amended by official action of the City, and any modifications or amendments to any such Code adopted in the future by City.

(e) Police Power. In all respects not provided for in this Agreement, City shall retain full rights to exercise its police power to regulate the development of the Property. Any uses or developments requiring a site plan, tentative tract map, conditional use permit, variance, or other discretionary permit or approval in accordance with the Existing Land Use Regulations shall require a permit or approval pursuant to this Agreement, and, notwithstanding any other provision set forth herein, this Agreement is not intended to vest Developer's right to the issuance of such permit

or approval nor to restrict City's exercise of discretion with respect thereto.

(f) Fees and Charges Nothing set forth in this Agreement is intended or shall be construed to limit or restrict City's authority to impose new fees, charges, assessments, or taxes for the development of the Property or to increase any existing fees, charges, assessments, or taxes, provided such fees, charges, assessments or taxes are of general applicability to similarly situated property or uses, and nothing set forth herein is intended or shall be construed to limit or restrict whatever right Developer might otherwise have to challenge any fee, charge, assessment, or tax either not set forth in this Agreement or not in effect as of the Effective Date. In connection therewith, Developer shall timely pay all applicable fees, charges, assessments, and special and general taxes validly imposed in accordance with the Constitution and laws of the State of California, including without limitation school impact fees in accordance with Government Code §§ 65995, *et seq.*

4.8 Referenda and Moratoria. It is the express intent of the Parties that this Agreement is a legally binding contract which, to the extent legally permissible, shall prevail over the provisions of any subsequently enacted moratorium, statute, ordinance, limitation, or other measure, whether or not enacted by City, or under the authority of City, by voter initiative or referendum, statute, ordinance, limitation, or other measure, subject only to the rights and powers specifically reserved to City under the terms of this Agreement. Nothing herein is intended to impose any liability on City in the event any subsequently enacted voter initiative or referendum prevents performance of this

Agreement.

4.9 Compliance with Environmental Mitigation Measures. Developer shall, as a condition and term of the Agreement, perform and execute all measures set forth in the Mitigation Monitoring Plan, attached hereto as Exhibit B and incorporated herein, and each such activity, improvement, facility, standard and other requirement is hereby made an obligation of Developer, enforceable as provided herein. Developer shall maintain all on-site drainage and sewer facilities until all property on which such facilities are located has been formally annexed into the Hamilton Cove Homeowner's Association or, for those facilities serving the single family lots, a homeowner's association established with regard to such single family lots, as applicable.

4.10 Additional Conditions. Developer, as a term and condition of the Agreement and the Approvals, shall comply with the following:

(a) Casino Way. Prior to the issuance of building permits for the second phase of the Project, Developer shall construct retaining walls and other improvements along Casino Way as designed and certified by a certified geological engineer and approved by the Building Official and the Planning Director so as to create up to 35 additional parking spaces which will supplement the 18 parking spaces to be created on Metropole Avenue, for a total of 53 additional autoette parking spaces, except as otherwise noted in Section 4.2.

(b) Bioxide Injector. Prior to the issuance of building permits for the second phase of the Project, Developer shall install a bioxide injector system at

or near the Casino on Casino Way, in a location to be approved by City and, if on SCICo property, by SCICo, to control odors in the wastewater treatment system. One year after its installation, Developer shall dedicate the bioxide injector to City and City shall be responsible thereafter for its operation and maintenance.

(c) Housing Project(s).

(i) Number of Units Required and Timing of Construction.

The Mitigation Monitoring Plan and the Project approvals require construction of eighteen (18) housing units, one of which is a manager's unit that Developer plans to create on the Project site. Developer and SCICo have stated their intent to construct the remaining seventeen (17) required housing units at Bird Park Canyon or other site reasonably acceptable to City, Developer and SCICo. The Parties acknowledge that construction in Bird Park Canyon may be delayed as a result of permitting and other issues relating to streambed alterations, debris and flood mitigations as well as the siting of the housing units. Therefore, the City will require Developer to construct only two of the required units (a low/moderate income and a middle income unit) at the time of development of the first phase of development of the Project. Unless otherwise agreed to pursuant to Section 10, Developer shall construct sixteen (16) units at Bird Park Canyon or elsewhere as a condition of development of the subsequent phases of the Project. At no time shall less than two required units be constructed per project phase. Prior to issuance of building permits for construction of the first phase of the Project (except the foundation permit), Developer shall (1) demonstrate to the

reasonable satisfaction of the Planning Director that Developer has rights to the site for the one moderate and one middle income unit, and (2) enter into a lease or other agreement providing for the right to construct and operate the unit or units; (3) have processed and received planning approvals and building permits for at least the first two (2) housing the unit or units.

(ii) Relationship Between Housing Unit(s) and Project

Construction. Prior to the issuance of building permits for any subsequent phase of the Project, Developer shall demonstrate to the reasonable satisfaction of the Planning Director with regard to the remaining housing units that (1) Developer has legal rights to site(s); (2) submits a detailed schedule for construction and completion of the units; and (3) commences construction (defined as foundations and framing in progress or, in the case of modular units, a contractual obligation to purchase such units is in place).

Whenever progress on the remaining Housing Units is substantially (more than 30 days) behind the expected progress set out in the schedule submitted by Developer, the City Planning Director shall retain the authority to halt construction of a Project phase and/or delay issuance of certificates of occupancy for Project units to ensure that construction of the housing units is proceeding so as to result in completion of housing units at the same time or prior to the issuance of certificates of occupancy for the phase of the Project for which the housing units are a requirement.

(iii) Affordability of Housing Units. Developer or other

Housing Developer shall construct and offer for occupancy the following types of units:

Four (4) Moderate and Fourteen (14) Middle Income units*

* Affordability and Income levels shall be as set forth in City's Inclusionary Housing Ordinance as determined by implementing regulations as may be adopted from time to time. City or its designee shall have oversight authority to ensure compliance with the qualifications, affordability and occupancy requirements as set forth in the Inclusionary Housing Ordinance.

{iv. Manager's Unit The manager's unit shall be constructed in conjunction with the first amenities as described in the project description in the Focused EIR for Hamilton Cove Phase II. A Certificate of Occupancy will not be issued for any of the amenities until the Manager's unit is finished and issued a certificate of occupancy.

(d) Purchase of Fire Engine Pump Truck. Prior to the issuance of Certificate of Occupancy for each of the first twelve (12) units constructed, Developer shall pay to the City \$6,250 for each unit, which monies shall be used towards the cost of a fire engine pump truck to be placed at the substation at Hamilton Cove. Once a Certificate of Occupancy is issued for the twelfth unit, and notwithstanding delays in construction of subsequent phases of the Project or abandonment of the Project, Developer shall make an annual payment of \$10,000 per year for the next ten years, due on or before June 15, for a total fixed cost of \$175,000 for such Fire Truck. Until such time that a homeowner's association agrees to reimburse City for the cost of maintaining the substation and associated emergency services equipment, Developer

shall reimburse City its reasonable costs therefor, as determined annually by the Fire Chief and the Director of Public Works based upon actual labor and materials costs. City shall remain owner of the fire engine at all times. In the event of non-payment by Developer or, upon completion or abandonment of the Project, the homeowner's association refuses or fails to assume maintenance costs, then City may remove the fire engine from Hamilton Cove or pursue its legal remedies to collect the sums due from Developer. Developer shall not be entitled to return or rebate of monies paid to City in the event the fire engine is removed from Hamilton Cove pursuant to the provisions of this section.

4.11 Standards for Improvements . All Required Improvements required under the Agreement shall be constructed in accordance with the Uniform Construction Codes then in effect. If the Uniform Construction Codes then in effect do not contain specifications for an improvement or portion thereof required under this Agreement, such improvements shall be constructed to a quality consistent with the most recent similar improvements installed by City or by any developer required by City to install such improvements. All such Required Improvements shall be completed and ready for inspection and approval by City no later than the time set forth in the Mitigation Monitoring Plan or the Agreement, as applicable. City shall cooperate with Developer to assure the prompt inspection and approval of all such improvements.

4.12 Posting of Security . Whenever Developer is required to construct the Required Improvements and/or facilities under this Agreement, it shall post in favor

of City cash, surety bonds (issued by carriers acceptable to City and qualified to do business within the State of California), letters of credit (issued by financial institutions acceptable to City), or other collateral acceptable to City to secure Developer's performance of its obligations, from time to time. City may require that existing security be increased based on increases in construction costs.

4.13 Indemnity. Subject to Section 6.4, Developer shall indemnify, defend and hold City harmless from any and all claims, causes of action, damages, costs or expenses (including reasonable attorneys' fees and costs) arising out of or in connection with, or caused on account of, the development of the Project hereunder, any Approval with respect thereto, or claims of injury or death to Persons, or damage to property, as a result of the operations of Developer or its employees, agents, contractors or representative with respect to the Project; provided, however, that the foregoing indemnity provision shall be void to the extent it violates applicable Laws.

5. Permitted Delays; Supersedure by Subsequent Laws.

5.1 Permitted Delays. In addition to any specific provisions of this Agreement, performance by any Party of its obligations hereunder shall be excused during any period of delay caused at any time by reason of acts of God or civil commotion, riots, strikes, picketing, or other labor disputes, unavailability of materials or supplies in quantities needed, or damage to work in process by reason of fire, floods, earthquake, or other casualties, restrictions imposed or mandated by governmental or quasi-governmental entities, enactment of conflicting Laws (including, without

limitation, new or supplementary environmental regulations), litigation, acts or neglect of the other parties, or any other cause beyond the reasonable control of the party. Each party shall promptly notify the other parties of any delay and the reason for such delay within thirty (30) days after such party knows or has reason to know that such delay will occur. The Term of this Agreement, including the Commencement of Construction Date, shall be extended by the period of any delay as set forth in this Section.

5.2 Supersedure by Subsequent Laws . If any Law made or enacted after the date of this Agreement prevents compliance with one or more provisions of this Agreement, then the provisions of this Agreement shall, to the extent feasible, be modified or suspended as may be necessary to comply with such new Law. Immediately after enactment of any such new Law, the parties shall meet and confer in good faith to determine the feasibility of any such modification or suspension based on the effect such modification or suspension would have on the purposes and intent of this Agreement. If such modification or suspension is infeasible in Developer's reasonable business judgment, then Developer shall have the right to terminate this Agreement by written notice to City. In addition, at Developer's election, the Term of this Agreement may be extended pursuant to Section 5.1 above for the duration of the period during which such new Law precludes compliance with the provisions of this Agreement provided that (a) such extension is subject to approval by City, which will not be unreasonably withheld, and (b) the aggregate of all such extension periods shall not

exceed five (5) years. In addition, Developer shall have the right to challenge the new Law preventing compliance with the terms of this Agreement, and in the event shall challenge is successful, this Agreement shall remain unmodified and in full force and effect, except that the Term shall be extended by such challenge pursuant to Section 5.1 above.

6. Events of Default; Remedies; Termination; Attorneys' Fees

6.1 Events of Default. Subject to any extensions of time agreed to by mutual consent in writing, and subject to the provisions of Section 5 regarding permitted delays, any failure by either Party to perform any material term or provision of this Agreement shall constitute an Event of Default, (a) if such defaulting Party does not cure such failure within thirty (30) days following notice of default from the other Party, where such failure is of a nature that it can be cured within such thirty (30) day period, or (b) if such failure is not of a nature that it can be cured within such thirty (30) day period, the defaulting Party does not within such thirty (30) day period commence substantial efforts to cure such failure, or thereafter does not within a reasonable time diligently prosecute to completion the curing of such failure. Any notice of default given hereunder shall specify in detail the nature of the failure in performance which the noticing party claims constitutes the Event of Default and the manner in which such Event of Default may be satisfactorily cured in accordance with the terms and conditions of this Agreement. During the time periods herein specified for cure of a failure of performance, the party charged therewith shall not be considered to be in default for

purposes of termination of this Agreement, termination of the Development Agreement, or institution of legal proceedings with respect thereto.

6.2 Remedies. The Parties would not have entered into this Agreement without the limits on damages under this Agreement set forth herein. Moreover, the Parties would not have entered into this Agreement if each had not acknowledged that a reasonable relationship exists between the risks and benefits accruing to each under this Agreement. Accordingly, the Parties agree that each of the Parties hereto may pursue any remedy at law or equity available for the breach of any provision of this Agreement, subject to the following:

(a) City shall not be liable in damages to Developer, or to any successor in interest of Developer, or to any other person, and Developer covenants not to sue for damages or claim any damages:

(i) For any breach of this Agreement or for any cause of action which arises out of this Agreement; or

(ii) For the taking, impairment, or restriction of any right or interest conveyed or provided under or pursuant to this Agreement or otherwise; or

(iii) Arising out of or connected with any dispute, controversy or issue regarding the application or interpretation or effect of the provisions of this Agreement.

(b) Developer shall not be liable in damages to City or to any person

acting on behalf of City, and City covenants not to sue for damages or claim any damages:

- (i) For any breach of this Agreement or for any cause of action which arises out of this Agreement; or
- (ii) Arising out of or connected with any dispute, controversy, or issue regarding the application or interpretation or effect of the provisions of this Agreement;
- (iii) Provided, however, that City reserves the right to claim damages for reimbursement for the actual costs to City incurred by City to construct or complete any Required Improvement in the event Developer fails to construct or complete such improvement and the failure to construct or complete the improvement constitutes a threat to public health, welfare or safety or constitutes a public nuisance; and provided further that City reserves the right to claim damages and for any sums payable by Developer to City which Developer has failed to pay, including, without limitation, all litigation costs, including reasonable attorneys' fees, incurred as the result of Developer's failure to defend City, or any officer, employee, agent or independent contractor of City, which Developer is obligated to defend pursuant to Section 8.4 hereof. Nothing herein is intended to create any right on the part of City to construct or complete improvements on the Property.

(c) The Parties acknowledge that money damages and remedies at law generally are inadequate and that specific performance is an appropriate remedy

for the enforcement of this Agreement and should be available to all parties for the following reasons:

(i) Money damages are unavailable against the Parties except as provided above.

(ii) Due to the size, nature and scope of the Project, it will not be practical or possible to restore the Property to its preexisting condition once implementation of this Agreement has begun. After such implementation, HLH and Developer may be foreclosed from other choices they may have had to utilize the Property and provide for other benefits. Developer has invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the terms of this Agreement, and will be investing even more significant time and resources in implementing the Project in reliance upon those terms, and it will not be possible to determine the sum of money that would adequately compensate Developer for such efforts. By the same token, City will have invested substantial time and resources and will have permitted irremediable changes to the land use and increased demands on the surrounding infrastructure and will have committed, and will continue to commit, to provide infrastructure and related improvements to meet the needs of the proposed development and to mitigate its effect on the area and upon City and the public at large, all in reliance upon the terms of this Agreement, and it would not be possible to determine a sum of money which would adequately compensate City for such undertakings. For these reasons, the Parties agree that if any Party fails to carry

out its obligations under this Agreement, the other Party shall be entitled in addition to such other remedies available to it, to the remedy of specific performance of this Agreement.

(d) Except for non-damages remedies, including the remedy of specific performance and judicial review, and except as otherwise provided herein, each Party, for itself, its successors and assignees, hereby releases each other Party, its officers, agents and employees from any and all claims, demands, actions, or suits of any kind or nature arising out of any liability, known or unknown, present or future, including, but not limited to, any claim or liability, based or asserted, pursuant to Article I, Section 19 of the California Constitution, the Fifth Amendment of the United States Constitution, or any other law or ordinance which seeks to impose any other liability or damage, whatsoever, upon such Party because it entered into this Agreement or because of the terms of this Agreement. Nothing herein shall be deemed to waive the Parties' rights to recover costs and expenses of suit, including reasonable attorneys' fees, pursuant to 6.4.

6.3 Waiver; Remedies Cumulative. Failure by a Party to insist upon the strict performance of any of the provisions of this Agreement by the other Party, irrespective of the length of time for which such failure continues, shall not constitute a waiver of such Party's right to demand strict compliance by such other Party in the future. No waiver by a Party of an Event of Default shall be effective or binding upon such Party unless made in writing by such Party, and no such waiver shall be implied

from any omission by a Party to take any action with respect to such Event of Default. No express written waiver of any Event of Default shall affect any other Event of Default, or cover any other period of time, other than the Event of Default and/or period of time specified in such express waiver. One or more written waivers of an Event of Default under any provision of this Agreement shall not be deemed to be a waiver of any subsequent Event of Default, or the performance of the same or any other term or provision contained in this Agreement. All of the remedies permitted or available to a Party under this Agreement, or at law or in equity, shall be cumulative and not alternative, and invocation of any such right or remedy shall not constitute a waiver or election of remedies with respect to any permitted or available right or remedy. In connection with the foregoing provisions, each Party acknowledges, warrants and represents that it has been fully informed with respect to, and represented by counsel of such Party's choice in connection with, the rights and remedies of such Party hereunder, the waivers herein contained, and after such advice and consultation has presently and actually intended, with full knowledge of such Party's rights and remedies otherwise available at law or in equity, to waive and relinquish such rights and remedies to the extent specified herein, and to rely to the extent herein specified solely on the remedies provided for herein with respect to any breach of this Agreement by the other Party.

6.4 Litigation Expenses.

- (a) Payment to Prevailing Party. If any Party brings an action

or proceeding (including any cross-complaint, counterclaim, or third-party claim) against another Party by reason of an Event of Default, or otherwise arising out of this Agreement, the prevailing Party in such action or proceeding shall be entitled to its costs and expenses of suit, including reasonable attorneys' fees, which shall be payable whether or not such action is prosecuted to judgment. "Prevailing Party" within the meaning of this Section shall include a Party who dismisses an action for recovery hereunder in exchange for payment of the sums allegedly due, performance of covenants allegedly breached, or consideration substantially equal to the relief sought in the action.

(b) Attorneys' Fees in Third Party Litigation. If any party is required to initiate or defend any action or proceeding with a third Person (including any cross-complaint, counterclaim or third-party claim) because of another party's commission of an Event of Default, or failure to enforce this Agreement, or otherwise arising out of this Agreement, and such initiating or defending party is the prevailing party in such action or proceeding, then such party shall be entitled to reasonable attorneys' fees from such other party. Notwithstanding the foregoing, if any action is brought challenging the legal validity of this Agreement or any Approvals subsequently given pursuant hereto, Developer shall defend such action at its own cost, although City shall be permitted, but not required, to appear in the action at its own cost; if such action is based on any allegation of a violation of the Fair Political Practices Act by any City official, or a violation of the Ralph M. Brown Act by the City, then City shall defend

the action at its own cost, and Developer shall be permitted, but not required, to appear in the action at its own cost. If any action includes both allegations that Developer is required to defend hereunder and allegations that City is required to defend hereunder, each shall be obligated to defend such respective allegations at its own cost, and shall be permitted to appear in the action at its own cost with respect to the other allegations. In such event, City and Developer shall cooperate in good faith to coordinate their defenses and maximize the efficiency thereof.

(c) Scope of Fees. Attorneys' fees under this Section shall include attorneys' fees on any appeal, and, in addition, a party entitled to attorneys' fees shall be entitled to all other reasonable costs and expenses incurred in connection with such action, including but not limited to, expert witness fees and arbitration expenses.

6.5 Effect of Termination. If this Agreement is terminated on account of an Event of Default, such termination shall not affect any right or duty emanating from any City entitlements or Approvals with respect to the Property or the Project approved prior or subsequent to the approval of this Agreement. If Developer is the terminating Party, then any and all benefits to or upon public property or publicly owned infrastructure, shall be retained by City; if City is the terminating Party, then Developer shall be entitled to all of the benefits arising out of, or entitlements on account of, any Exactions or Processing Fees paid, given or dedicated to or received by City under the Development Agreement; provided, however, that such shall not be

deemed to be exclusive of any other remedy available. Notwithstanding the foregoing provisions, or any other provision of this Agreement, no termination of this Agreement shall prevent Developer from completing and occupying buildings or other improvements authorized pursuant to valid building permits previously approved by City or under construction at the time of termination, but City may take any action permitted by law to prevent, stop or correct any violation of law occurring during and after construction. As used herein, "construction" shall mean work under a valid building permit, and "completing" shall mean completion for beneficial occupancy for Developer's use.

6.6 Effect of Court Action. If any action or proceeding is instituted by any third Person challenging the validity of any provision of this Agreement, or any Approval, action or decision taken or made hereunder, the parties shall cooperate in defending such action or proceeding as set forth in Section 6.5; however, without regard to whether or not Developer is a party to or real party in interest in such action or proceeding, then any such action shall constitute a permitted delay under Section 5.

6.7 Certain Obligations Not Recourse. Notwithstanding anything to the contrary herein contained, no elective or appointive board, commission, officer, agent or employee of City, and no member, partner, officer, director, shareholder, trustee, beneficiary or agent of Developer, shall be personally liable upon any of the obligations of City or Developer hereunder, and each party shall look solely to the assets of Developer or City (as the case may be) and shall have no right of recourse against the

assets of any such other person herein specified.

6.8 Estoppel Certificate. Any Party may, at any time, and from time to time, deliver written notice to another Party requesting such Party to certify in writing that, to the knowledge of the certifying Party, (a) this Agreement is in full force and effect and a binding obligation of the Parties, (b) this Agreement has not been amended or modified either orally or in writing, and if so amended, identifying the amendments, and (c) the requesting Party is not in default in the performance of its obligations under this Agreement, or if in default, describing the nature and amount of any such defaults. A Party receiving a request hereunder shall execute and return such certificate within thirty (30) days following the receipt thereof. The City Manager shall have the power to execute any certificate requested by Developer hereunder. City acknowledges that a certificate hereunder may be relied upon by transferees and Mortgagees.

7 Mortgagee Protection; Certain Rights of Cure.

7.1 Mortgagee Protection. This Agreement shall be superior and senior to any lien placed on the leasehold interest in the Property, or any portion thereof, including the lien of any Mortgage. Notwithstanding the foregoing, no breach hereof shall defeat, render invalid, diminish or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Agreement shall be binding upon and effective against any Person (including any Mortgagee) who acquires Developer's interest in the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure, otherwise.

7.2 Mortgagee Not Obligated . Notwithstanding the provisions of the preceding Section, no Mortgagee shall have any obligation or duty under this Agreement to construct or complete the construction of improvements, or to guarantee such construction or completion; provided, however, that a Mortgagee shall not be entitled to devote the Property to any uses or to construct any improvements thereon other than those uses or improvements provided for or authorized by this Agreement, or otherwise under City's Ordinances and the Property and operation thereof shall remain subject to the requirements set forth herein.

7.3 Notice of Default to Mortgagee; Right of Mortgagee to Cure. If City receives notice from a Mortgagee requesting a copy of any notice of default given Developer hereunder and specifying the address for service thereof, then the City shall deliver to such Mortgagee, concurrently with service thereon to Developer, any notice given to Developer with respect to any claim by City that Developer has committed an Event of Default or any noncompliance that would become an Event of Default if not cured or remedied.

Each Mortgagee shall have the right (but not the obligation) for a period of ninety (90) days after the receipt of such notice to cure or remedy, or to commence to cure or remedy, the Event of Default claimed or the areas of noncompliance set forth in the notice. If the Event of Default or such noncompliance is of a nature which can only be remedied or cured by such Mortgagee upon obtaining possession, such Mortgagee may seek to obtain possession with diligence and continuity through a

receiver or otherwise, and may thereafter remedy or cure the Event of Default or noncompliance within ninety (90) days after obtaining possession. If any such Event of Default or noncompliance cannot, with diligence, be remedied or cured within such ninety (90) day periods, then such Mortgagee shall have such additional time as may be reasonably necessary to remedy or cure such Event of Default or noncompliance if such Mortgagee commences cure during such ninety (90) day periods, and thereafter diligently pursues completion of such cure to the extent possible. Notwithstanding the foregoing, nothing contained in this Agreement shall be deemed to permit or authorize any Mortgagee to undertake or continue construction or completion of any improvements comprising the Project (beyond the extent necessary to conserve or protect improvements or construction already made) without first having expressly assumed Developer's obligation hereunder in the manner specified in Section 10.

7.4 Right to Cure. If Developer defaults under any Mortgage, then City and/or HLH, or HLH's designee shall have the right, but not the obligation, to cure such default prior to completion of any foreclosure or any proceeding to terminate the interest of Developer in the Property. Each Mortgagee shall provide to City and HLH any notice of default given Developer under its Mortgage concurrently with serving the same upon Developer. If City and/or HLH invokes its right to cure hereunder, they shall be entitled to reimbursement from Developer of all costs and expenses incurred in curing such default. City shall also be entitled to a lien upon any of the Property, or portion thereof, encumbered by the Mortgage with respect to which Developer has

defaulted, to the extent of such costs and disbursements. Any such lien shall be subject and subordinate to the interest of any Mortgagee under its Mortgage, regardless of the date of recordation or creation thereof., except that property tax liens shall have priority over any Mortgage.

8 Transfers and Assignments.

8.1 Right to Assign. Subject to the prior written approval of City and SCICO, which will not be unreasonably withheld or delayed, and such approval from HLH or SCICo as may be required under agreements between HLH or SCICo and Developer, Developer shall have the right to sell, assign or transfer this Agreement, and all of its rights, duties and obligations hereunder, to any Person at any time during the Term of this Agreement; provided, however, in no event shall the rights, duties and obligations conferred upon Developer pursuant to this Agreement be at any time so transferred or assigned except through a transfer of an interest of Developer in the Property or portion thereof and only upon express and unconditional assumption of all of the obligations of Developer contained herein.

8.2 Release Upon Transfer. Upon the sale, transfer or assignment of Developer's rights and interests under this Agreement under the preceding Section, Developer shall be released from its obligations under the this Agreement with respect to the Property so transferred arising subsequent to the effective date of such transfer if (a) Developer is not then in default under this Agreement, (b) Developer has provided to City and HLH notice of such transfer, and City and HLH have approved the transfer (c)

the transferee executes and delivers to City and HLH a written agreement in which (i) the name and address of the transferee is set forth and (ii) the transferee expressly and unconditionally assumes all of the obligations of Developer under this Agreement with respect to the Property, or portion thereof, transferred. Developer shall, in any event, give notice to City and HLH, disclosing the identity of the transferee and such transferee's address. Failure to deliver a written assumption agreement hereunder shall not affect the running of any covenants herein with the land, as provided in the following Section nor shall such failure negate, modify or otherwise affect the liability of any transferee pursuant to the provisions of this Agreement.

8.2 Formation of Partnership or Joint Venture. Notwithstanding any other provision hereof, the Developer reserves the right at its discretion to join and associate with other entities in joint ventures, partnerships or otherwise for the purpose of acquiring and developing the Project, provided that Developer will remain fully responsible to City as provided in this Agreement. Wherever the term "Developer" is used herein, such term shall include any permitted nominee or assignee as herein provided, except as specifically limited herein.

9. Covenants Run with the Property Interest . All of the provisions, agreements, rights, powers, standards, terms, covenants and obligations respectively imposed on a Party to this Agreement shall be binding upon such Party and its respective heirs, successors (by merger, consolidation, or otherwise) and assigns, devisees, administrators, representatives, lessees, and, as applicable, any Person

acquiring Developer's interest in the Property, or any portion thereof, or any interest therein, whether by operation of Laws or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective heirs, successors, and assigns. All of the provisions of this Agreement shall be enforceable as equitable servitudes and constitute covenants running with the land pursuant to applicable law, including, but not limited to, Section 1468 of the California Civil Code. Each covenant to do or refrain from doing some act on the Property hereunder, or with respect to any City owned property, (a) is for the benefit of such properties and is a burden upon such properties, (b) runs with such properties, and (c) is binding upon each Party and each successive owner during its ownership of such properties or any portion thereof, and upon each Person having any interest therein derived in any manner through any owner of such properties, or any portion thereof, and shall benefit each Party and its property hereunder, and each other Person succeeding to an interest in such properties.

10. Amendment and Termination.

10.1 Amendment or Cancellation. This Agreement may be canceled, modified or amended only by mutual consent of the Parties in writing.

10.2 Recordation of Amendment . Any amendment or cancellation of this Agreement effected by the Parties hereunder shall be recorded by the City Clerk as specified in Section 2.3 above not later than ten (10) days after the effective date of the action effecting such amendment or cancellation, which amendment or cancellation shall describe the Property subject thereto.

11. Notices.

11.1 Procedure. Any notice to any party shall be in writing and given by delivering the same to such party in person or by sending the same by Federal Express or other overnight delivery service or by registered or certified mail, or Express Mail, return receipt requested, with postage prepaid, to the party's mailing address. Notice may also be given by telecopier to the telecopier numbers given below for each recipient. The respective mailing addresses of the parties and interested entities, until changed as hereinafter provided, the following:

City: City of Avalon
P.O. Box 707
Avalon, CA 90704
Attention: City Manager
Fax: (310) 510-0901

with a
copy to: Scott Campbell, Avalon City Attorney
Same address as above
Fax: (310) 510-2125

SCICo/HLH: Santa Catalina Island Company
Post Office Box 737
Avalon, California 90704
Attn: Vice President, Real Estate
Fax: (310) 510-2300

with a
copy to: John Anglin, Esq.
Anglin, Flewelling, Rasmussen, Campbell & Trytten, LLP
199 So. Los Robles Ave, Suite 600
Pasadena, CA. 91101
Fax: (626) 577-7764

Hamilton Pacific: Hamilton Pacific LLC
Michael Flynn, Member
113 Via de la Valle
Del Mar, CA 92014

With a copy to: Bruce R. Wallace, Esq.
Wertz McDade Wallace Moot & Brower

945 Fourth Avenue
San Diego, California 92101
Fax: (619) 696-9476

Any party or interested entity may change its mailing address at any time by giving written notice of such change to all other parties in the manner provided herein at least ten (10) days prior to the date such change is effected. All notices under this Agreement shall be deemed given, received, made or communicated on the date personal delivery is effected or, if mailed, on the delivery date or attempted delivery date shown on the return receipt.

11.2 Form and Effect of Notice. Every notice (other than the giving or withholding of consent, approval or satisfaction under this Agreement, but including requests therefor) given to a party shall comply with the following requirements. Each such notice shall state: (a) the Article or Section of this Agreement pursuant to which the notice is given; (b) the period of time within which the recipient of the notice must respond or, if no response is required, a statement to that effect; and (c) if applicable, that the failure to respond to the notice within the stated time period shall be deemed to be the equivalent of the recipient's approval of or consent to the subject matter of the notice. Each request for consent or approval shall contain reasonably sufficient data or documentation to enable the recipient to make an informed decision. In no event shall notice be deemed given by such party's failure to object or respond thereto if such notice did not fully comply with the requirements of this Section. No waiver of this Section shall be inferred or implied from any act (including conditional approvals, if any) of a party, unless such waiver is in writing, specifying the nature and extent of the waiver.

13. Annual Review.

13.1 Timing of Annual Review. During the Term of this Agreement, at

least once during every twelve (12) month period from the Effective Date, City shall review the good faith compliance of Developer with the terms of this Agreement ("Annual Review"). The Annual Review shall be conducted by the City Council or its designee in accordance with the City Development Agreement Ordinance.

13.2 Standards for Annual Review. During the Annual Review, Developer shall be required to demonstrate good faith compliance with the terms of this Agreement. If City or its designee finds and determines that Developer has not complied with any of the terms or conditions of this Agreement, then City may declare a default by Developer in accordance with Section 10 herein. City may exercise its rights and remedies relating to any such event of default only after the period for curing a default as set forth in Section 10 has expired without cure of the default. The costs incurred by City in connection with the Annual Review process shall be paid by Developer.

13.3 Certificate of Compliance. With respect to each year in which City approves Developer's compliance with this Agreement, City shall, upon written request by Developer, provide it with a written certificate of good faith compliance within thirty (30) days of City's receipt of the request for same.

14. Third Party Legal Challenge. In the event of any legal action instituted by any third party challenging the validity or enforceability of any provision of this Agreement, the Existing Land Use Regulations, or the planning approvals granted by City ("Third Party Legal Challenge"), City shall have the right but not the obligation to defend such Third Party Legal Challenge and Developer shall be responsible for the legal

expenses incurred by City in connection therewith. Developer also shall have the right but not the obligation to defend any Third Party Legal Challenge. If Developer defends any such Third Party Legal Challenge, so long as Developer is not in default hereunder, City shall not allow any default or judgment to be taken against it or compromise the defense of the action without Developer's prior written approval. Where Developer defends the Third Party Legal Challenge, it shall further have the right to settle such Third Party Legal Challenge, provided that nothing herein shall authorize Developer to settle such Third Party Legal Challenge on terms that would constitute an amendment or modification of this Agreement, the Existing Regulations or the approvals unless such amendment or modification is approved by City in accordance with applicable legal requirements, and City reserves its full legislative discretion with respect thereto. In the event City elects to defend the Third Party Legal Challenge, Developer shall indemnify and hold harmless City and its officials and employees from and against any claims, losses, or liabilities assessed or awarded against City by way of judgment, settlement, or stipulation. Subject to Section 6.4, if Developer defends any such Third Party Legal Challenge, it shall indemnify and hold harmless City and its officials and employees from and against any claims, losses, or liabilities assessed or awarded against City by way of judgment, settlement, or stipulation.

15. Miscellaneous.

15.1 Negation of Partnership. The Parties acknowledge that the Project is a private development, that no Party is acting as the agent of any other Party in any respect, and that each Party is an independent contracting entity with respect to this Agreement. This Agreement is not intended nor shall it be construed to create any third party beneficiary rights in any Person who is not a party except when HLH or SCICo is expressly given a right or power under this Agreement.

15.2 Consents . Unless otherwise herein provided, whenever approval, consent or satisfaction (herein collectively referred to as a "consent") is requested of a Party pursuant to this Agreement, it shall not be unreasonably withheld. Unless provision is made for a specific time period, consent shall be deemed given within sixty (60) days after receipt of the written request for consent, and if a Party shall neither consent nor refuse consent within such sixty (60) day period, or other time period as may be specified in this Agreement for consent, it shall be deemed to have given its consent. If a Party refuses consent, it shall state its reasons in reasonable detail in writing. Consent by a Party to any act or request by another Party shall not be deemed to waive or render unnecessary consent to any similar or subsequent acts or requests. The standards, terms and conditions for consents under this Agreement shall extend to and bind the members, partners, officers, directors, shareholders, trustees, beneficiaries, agents, elective or appointive boards, commissions, employees, and other authorized representative of each Party, and each such Person shall make or enter into,

or take any action in connection with, any consent hereunder in accordance with such standards, terms and conditions.

15.3 Not a Public Dedication . Subject to any requirements of the Coastal Commission, nothing herein shall be deemed to be a gift or dedication of the Property, or of the Project, or portion thereof, to or for the general public, or for any public use or purpose whatsoever. The Parties intend that this Agreement be strictly limited to and for the purposes herein expressed for the development of the Project as private property. Developer may prevent or prohibit the use of the Property, or the Project, or any portion thereof, including common areas and buildings and improvements located thereon, by any Person for any purpose inimical to the operation of a private, integrated mixed-use Project as contemplated by this Agreement, but will not restrict public access to the Property in violation of the Local Coastal Plan, any other Existing Approvals or the terms of any Lease or Sublease contemplated by this Agreement.

15.4 Severability. Invalidation of any part of this Agreement, or of the application thereof to any Person, by judgment or court order shall not affect the remainder of the Agreement or its application to any other Person; such remainder shall remain in full force and effect, unless enforcement of this Agreement as so invalidated would be unreasonable or grossly inequitable under all the circumstances or would frustrate the purposes of this Agreement.

15.5 Exhibits . All Exhibits referred to in this Agreement are deemed

incorporated herein in their entirety by reference thereto and shall constitute an integral part of this Agreement.

15.6 Entire Agreement . This written Agreement, including the Exhibits, contains the entire agreement between the parties with respect to the subject matter hereof. Except as otherwise specified in this Agreement, any prior correspondence, memoranda, agreements, warranties or representations are superseded in total by this Agreement.

15.7 Construction of Agreement . The provisions of this Agreement shall be construed as a whole according to their common meaning and not strictly for or against any party and consistent with the provisions hereof, in order to achieve the objectives and purpose of the parties hereunder. The captions contained herein are included only for convenience of reference and shall be disregarded in the construction and interpretation of this Agreement. Wherever required by the context, the singular shall include the plural and vice versa, and the masculine gender shall include the feminine or neuter genders, or vice versa.

15.8 Mitigation of Damages . In all situations arising out of this Agreement, the Parties shall attempt to avoid and minimize the damages resulting from the conduct of the other Party. Each Party shall take all necessary measures to effectuate the provisions of this Agreement.

15.9 Further Assurances; Covenant to Sign Documents . Each Party covenants, on behalf of itself and its successors, heirs and assigns, to take all actions and

do all things, and to execute, with acknowledgment or affidavit if required, any and all documents and writings, that may be necessary or proper to achieve the purposes and objectives of this Agreement.

15.10 Covenant of Good Faith and Fair Dealing. No Party shall do anything which shall have the effect of harming or injuring the right of another Party to receive the benefits of this Agreement; each Party shall refrain from doing anything which would render its performance under this Agreement impossible; and each Party shall do everything which this Agreement contemplates that such Party shall do in order to accomplish the objective and purposes of this Agreement.

15.11 Governing Law . This Agreement, and the rights and obligations of the Parties, shall be governed by and interpreted in accordance with the laws of the State of California.

15.12 References; Terminology . Unless otherwise specified, whenever in this Agreement, reference is made to the Table of Contents, any Article or Section, or any defined term, such reference shall be deemed to refer to the Table of Contents, Article or Section or defined term of this Agreement. The use in this Agreement of the words "including", "such as" or words of similar import when following any general term, statement or matter shall not be construed to limit such statement, term or matter to the specific items or matters, whether or not language of nonlimitation, such as "without limitation" or "but not limited to", or words of similar import, are used with reference thereto, but rather shall be deemed to refer to all other items or matters that

could reasonably fall within the broadest possible scope of such statement, term or matter.

15.13 Counterparts. For convenience, the signatures of the Parties to this Agreement may be executed and acknowledged on separate pages which, when attached to this Agreement, shall constitute this as one complete Agreement.

15.14 Time. Time is of the essence of this Agreement and of each and every term and condition hereof.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

AUTHORIZED SIGNATURE OF CITY TO AGREEMENT:

"City"
City of Avalon

ATTEST:

By:
Anni Marshall, Mayor

By:
Denise Radde, City Clerk

Approved as to Form:

By: _____
Scott Campbell, City Attorney

[Attach Appropriate Acknowledgment]
AUTHORIZED SIGNATURE OF HAMILTON PACIFIC TO AGREEMENT:

Hamilton Pacific, a limited liability company

By:
Michael W. Flynn, its Member

LIST OF EXHIBITS

Exhibit A: Project Boundaries
Exhibit B: Mitigation Monitoring Plan



CITY COUNCIL

MEETING DATE: June 3, 2014

AGENDA ITEM: _____

ORIGINATING DEPT: Planning

CITY MANAGER: _____

PREPARED BY: Amanda Cook

DEPT. HEAD: _____

SUBJECT: Third Amendment to Development Agreement with Hamilton Pacific, LLC

RECOMMENDED ACTION(S): Adopt An Ordinance of the City of Avalon Approving the Third Amended Development Agreement Between the City of Avalon and Hamilton Pacific, LLC ("Agreement").

REPORT SUMMARY: On May 20, 2014, the City Council conducted a Public Hearing to hear public comment on the Third Amendment to the Development Agreement with Hamilton Pacific, LLC. An ordinance to approve this agreement was introduced and all readings waived.

History: A Tentative parcel map was approved to subdivide five parcels (that include three of the existing pads) that were originally approved for multi-unit condominiums with a height variance of 22'/50'; into twelve parcels for single family dwellings with a height variance of 22'/50'.

The proposed amendments are as follows:

The introductory paragraph to the Agreement is amended as follows:

The Parties desire to amend the Agreement to incorporate previously agreed changes pertaining to the project description, specifically, the housing mix and the height envelope thereto.

Section 4.2(e)(1) is amended as follows:

Maximum Permitted Height. In accordance with the height variance granted as part of the Existing Approvals, the maximum permitted height envelope for congregate structures shall be 22'/50' and 18'/40' for the single family residences, excluding chimneys, eaves, and minor decorative architectural elements such as elevator tower caps, pergolas, and similar structures. approvals dated 9/26/2007 for Tentative Tract Map No. 69836 which included a height envelope of 22'/50' for 21 parcels for condominiums and 18'/40' for 24 parcels for single family dwellings and the height variance granted 3/16/2014 for 22'/50' for the twelve parcels of TM 72448 for single family dwellings. Excluding chimneys, eaves and minor decorative architectural elements such as elevator tower caps, pergolas and similar structures

Recital G is amended, in part, as follows:

The mitigation and/or requirements of this agreement are based on the findings in the Focused EIR, the addendum to the Focused EIR, the Mitigation Monitoring Plan and the City's Affordable Housing Ordinance.

FISCAL IMPACTS: None

CONSEQUENCES OF NOT FOLLOWING RECOMMENDED ACTION(S): The Development Agreement would not be consistent with the current project approvals.

ALTERNATIVE ACTION(S): None

FOLLOW UP ACTION(S): None

ADVERTISING, NOTICING AND PUBLIC CONTACT:

This item is included on the posted Agenda.

ATTACHMENTS: Ordinance

ORDINANCE NO. 1129-14

AN ORDINANCE OF THE CITY OF AVALON APPROVING THE THIRD AMENDED DEVELOPMENT AGREEMENT BETWEEN THE CITY OF AVALON AND HAMILTON PACIFIC, LLC

WHEREAS, the City of Avalon ("City") and Hamilton Pacific, LLC ("Developer") entered into a Development Agreement ("Agreement") on or about April 14, 2008; and

WHEREAS, the Agreement permits Developer to develop congregate units and single family lots and associated recreational facilities and infrastructure improvements on a 16-acre property in the City. This project is referred to as Hamilton Cove Phase II ("Project"); and;

WHEREAS, the Planning Commission recently approved an amended site plan, height variance, amended local coastal permit, and addendum to the Project's Environmental Impact Report which changed the Project's description; and

WHEREAS, the terms of the Agreement must be amended for the third time to reflect the Planning Commission approvals and to become effective; and

WHEREAS, the amendments to development agreements must be approved via ordinance with a first and second reading;

NOW THEREFORE THE CITY COUNCIL OF THE CITY OF AVALON DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. The introductory paragraph to the Agreement is amended as follows:

The Parties desire to amend the Agreement to incorporate previously agreed changes pertaining to the project description, specifically, the housing mix and the height envelope thereto.

Section 2. Section 4.2(e)(1) is amended as follows:

Maximum Permitted Height. In accordance with the height variance granted as part of the approvals dated 9/26/2007 for Tentative Tract Map No. 69836 which included a height envelope of 22'50' for 21 parcels for condominiums and 18'40' for 24 parcels for single family dwellings and the height variance granted 3/16/2014 for 22'50' for the twelve parcels of TM 72448 for single family dwellings. Excluding chimneys, eaves and minor decorative architectural elements such as elevator tower caps, pergolas and similar structures

Section 3. Recital G is amended, in part, as follows:

The mitigation and/or requirements of this agreement are based on the findings in the Focused EIR, the addendum to the Focused EIR, the Mitigation Monitoring Plan and the City's Affordable Housing Ordinance.

Section 4. Severability. The provisions of this Ordinance are hereby declared to be severable. If any provision, clause, sentence, or paragraph of this Ordinance, or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the other provisions of this Ordinance or the application of those provisions.

Section 5. Effective Date. This Ordinance shall become effective thirty (30) days after its adoption.

Section 6. Exemption from California Environmental Quality Act. The City finds that the amendments to the Municipal Code, made pursuant to this Ordinance, are exempt from the California Environmental Quality Act ("CEQA") because they do not constitute a project within the meaning of CEQA Section 15378. The amendments herein have no potential for resulting in physical change to the environment, directly or indirectly. The City further finds, under Title 14 of the California Code of Regulations, Section 15061(b)(3), that this Ordinance is nonetheless exempt from the requirements of CEQA in that the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. These amendments do not allow any new activities, but rather merely define a previously undefined term. The City Clerk shall be the custodian of record for the documentation supporting this action. Staff is hereby directed to file a Notice of Exemption with the Los Angeles County Clerk's Office within five (5) working days.

Section 7. The City Clerk is directed to certify the adoption of this Ordinance and cause the same to be published as required by law.

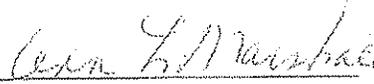
INTRODUCED at a Regular Meeting of the City Council of the City of Avalon, California, on the 20th day of May, 2014, and thereafter **ADOPTED** at a Regular Meeting of said City Council held on the 3rd day of June, 2014, by the following vote to wit:

AYES: Mayor Marshall, Councilmembers Olsen, Cassidy, Hernandez and Sampson

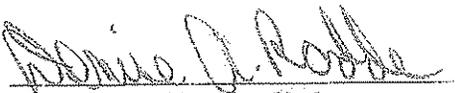
NOES: None

ABSENT: None

ABSTAIN: None


Ann H. Marshall, Mayor

ATTEST:


Denise A. Radde, City Clerk